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No. 883

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

ALEX MICELE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Alex Micele, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on January 8, 1964.

JUDGMENT AND OPINION OF THE COURT BELOW

On January 8, 1964, the United States Court of Appeals for the Seventh Circuit affirmed the judgments of conviction entered in the United States District Court for the

Northern District of Illinois, sentencing the appellant to imprisonment for a term of eight years, for violation of Section 174, Title 21, U. S. Code; a term of 5 years for violation of Section 1403, Title 18, U. S. Code; a term of eight years for violation of Section 174, Title 21, U. S. Code on a substantive count. The Court of Appeals opinion has not yet been reported. It is printed herewith as Appendix A.

JURISDICTIONAL STATEMENT

On a jury trial, appellant was convicted upon the three counts in which he was named as a defendant, in an indictment consisting of nineteen counts. Appellant was named in Count 1, which charged a conspiracy to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs unlawfully imported in violation of Section 174, Title 21, U. S. Code, and knowing said drugs were unlawfully imported; Count 11, charging the use of a communication facility in committing and in causing and facilitating the attempt to, or the commission of an offense, the penalty for which is provided in Title 21, Section 174, U. S. Code, in violation of Title 18, Section 1403, U. S. Code; Count 14, which charged the receiving, concealing and facilitation, transportation and concealment of unlawfully imported narcotics, in violation of Section 174, Title 21, U. S. Code.

On appeal to the United States Court of Appeals of the Seventh Circuit, the judgments of conviction were affirmed by an opinion filed January 8, 1964. (Appendix A)

A petition for rehearing was timely filed and was denied on January 31, 1964. (Appendix B)

The jurisdiction of the Court is invoked under the provisions of Title 28, U. S. Code 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Does prejudice occur to a defendant from the conduct and statements of the attorney for a co-defendant, equally as well as from the conduct and statements of the attorney for the government.

When the attorney for a codefendant, during cross examination of a government witness, deliberately and repeatedly propounds questions to a government witness, referring to the past criminal record and activities of another defendant, not represented by the questioning attorney, is the nature of such questions changed from prejudicial to innocuous.

And, does a trial court err in failing to grant a mistrial or in the alternative a severance during a trial, when the attorney for a co-defendant, repeatedly refers to the past criminal record and activities of another defendant, in the cross examination of a government witness.

2. Where the evidence clearly discloses not less than two separate and distinct alleged conspiracies, separated both by time and geographical chasms, an insufficiency of evidence exists to preclude a separate trial for persons not connected with all the evidential conspiracies presented.

3. Where a witness was permitted by the trial court to respond to a question as to the difference in the "story" he related to the Grand Jury before which he appeared and which Grand Jury did return the indictment then being tried, did the trial court err in striking from the jury's consideration answers to other proper questions by the government witness to the effect that the "story" told to the Grand Jury was different from that being told by him on the witness stand.

When a "particularized need" has been shown for an *in camera* examination of the minutes of the Grand Jury and use during the cross examination of the witness, the court may properly deny access to such minutes to the defense.

May, after denial of access to the minutes of the Grand Jury of the testimony of a main government witness by the defense, the government may state upon closing argument to the jury that the main government witness told the truth upon the trial of the cause.

4. Is the proof of a crime alleged in an indictment complete where the prosecution fails to establish the particular venue alleged in the indictment.

5. Where a main witness for the government is a felon as well as an accomplice, an instruction limited only to the "accomplice" nature of the witness is sufficient to apprise the jury of the proper weight to be given the testimony of an admitted felon.

6. Where a government attorney informs the jury that a witness has told the truth during his testimony at the trial and before the Grand Jury error occurs to the defendant.

STATUTES INVOLVED

Title 18, U. S. Code Section 1403.

Title 21, U. S. Code Section 174.

(Relevant portions set out in Appendix C).

STATEMENT OF THE CASE.

Albert Spagnola was brought from the Wisconsin State Prison where he was serving a term for conspiracy to commit burglary, for which he had been convicted over two years previous. (A. 24). His testimony was that in the summer of 1960 he met Louis Vaselli in a lounge at 3400 West North Avenue and that with him was a man, Joe Micele. In the courtroom he found it necessary to come down from the witness stand to the defendants' table in order to determine that the defendant, Alex Micele was the same man that he met in 1960 as Joe Micele. (A. 24). Vaselli at the time of his first meeting then sought to determine if the witness would be interested in selling narcotics. Spagnola there stated to Vaselli that he had never dealt in narcotics and would not know how to do it, but he would think about it. He saw Vaselli and Micele a few days later in the same lounge where he told Vaselli (A. 25) that he changed his mind about selling narcotics. Vaselli quoted him a price and Spagnola went to where Vaselli told him a package would be, after agreeing that Spagnola could have the package on consignment in that he had no money. Spagnola then met one, Del Monico at Flournoy and Laflin. A few days later, Del Monico paid to Spagnola $250.00, which was the same amount that Spagnola obtained the package from Vaselli for. (A. 25).

Spagnola met Vaselli and Micele the next night and paid the money to Vaselli, and asked Vaselli for more. (A. 25). Vaselli gave him a phone number. Spagnola called the number a few days later and talked to Vaselli, they agreed to meet farther west on North Avenue. When they did meet Micele was with Vaselli. Vaselli agreed to

credit for Spagnola and agreed for the sale of another ounce of heroin. Vaselli left and returned in 15 or 20 minutes and gave instruction to Spagnola where he could find a brown paper bag in which there was a white powder. The same night Spagnola again met DelMonico and gave him the package. A few days later he met Vaselli. Micele was present. He gave Vaselli $100.00, which he had received from Del Monico and promised to pay the balance in a few days. (A. 26). After that occasion, he saw Alex Micele and a man he knew as Hooks in the Shadow Box Lounge. Hooks asked him for the money owed to Vaselli. They walked out of the tavern and down Kimball, where he was grabbed by Micele and Hooks put a knife to his throat and sought the reason why he had not paid the balance of the money. Hooks told him that he knew him and his reputation for not paying people money he owed them and in response to Spagnola's question Hooks told him it was his business because "It is my stuff". Spagnola then promised to borrow the money to pay it. (A. 26).

That same night he met Del Monico and received the $150.00 from him, called Vaselli and Vaselli told him that if he couldn't make it to pick it up he would send Micele. The next night he met Hooks and Joe Micele, and gave Hooks the $150.00, and told them he wanted nothing more to do with them. (A. 26).

Spagnola then testified to other transactions with Vaselli, Oscar Luna and Del Monico, which took place in the form of personal meetings, purchases and deliveries of purported narcotics, at taverns and lounges, phone calls, all of which occurred without Micele being present or a party to the happenings, and all testimony being admitted only as against the defendant Micele, over his objection (A. 27-29).

Spagnola then testified to meeting Bernard Theisen in the presence of Oscar Luna in July of 1960 at a tavern at North and Cicero. Theisen introduced himself as a burglar and also dealt in narcotics. Spagnola told him he knew "a couple of guys on the south side by the name of Vaselli and Micele, that he had some trouble with them. He didn't want to get involved with them any more." Theisen asked Spagnola to make the connection for him, (A. 29, 30).

On cross examination (A. 30) the witness Spagnola stated he first met Vaselli in the County Jail in 1959, that he previously told the government agents Olivanti and Rankin that he met him in the summer of 1960 while he was in jail. That about six months before the trial of this cause he told government agents Theisen and Olivanti that he never sold narcotics and denied he had any information about it either. He also denied any involvement with Alex Miecle. (A. 33). That the only reason that he agreed to tell the government agents anything was he was assured he would be granted immunity. (A. 34) He further testified that he could not see Alex Miecle for sure while in the court room, that before he didn't need glasses to identify pictures of Miecle; in the statement that he gave the government agents (A. 34) he wasn't sure he mentioned Miecle. Further he testified on cross examination that he only handled the supposed narcotics as a favor; that he didn't make a profit; that he didn't know much about narcotics, nor did he know for a fact that whatever was in the packages were narcotics, nor did he know whether the contents of the packages were or were not narcotics. (A. 34, 35)

Bernard Theisen, Narcotic Agent, testified that on July 27, 1960, he met the witness Spagnola at the North Cicero Inn. That he told Spagnola he was a burglar and some

times fooled with narcotics. That Spagnola told him he dealt with two Italian boys on the south side of Chicago named Lou Vaselli and Joe Miecle and that he had a misunderstanding with them and hadn't seen them for a long time (A. 35). Theisen said he would like to meet them. The witness together with government agent Valentine sought to have Spagnola place them in contact with Vaselli, Miecle or one Joe Gaynor. They traced Spagnola to another tavern where Spagnola called a number for Vaselli and he arranged a meeting the next day, but at the appointed place Spagnola failed to materialize. (A. 36). Theisen met Spagnola on August 16, 1960, at the North Cicero Inn in Chicago. Spagnola entered a phone booth and on emerging said he had reached Lou and Lou had said to wait a few days. Spagnola showed Theisen a phone number of a bar on Rush Street. They met again on August 16, 1960, at the North Cicero Inn but Spagnola left returning at 12:30 a.m. August 17, 1960. Spagnola then went and made another phone call, after which he stated he had spoken to Lou Vaselli. Theisen next saw Spagnola at about 11:00 P.M. on August 17, 1960, and Spagnola made another call then saying he had reached Lou but was unable to make further arrangements. He next saw Spagnola in April of 1962, in the Waupun State Prison, Wisconsin, in the presence of Olivanti. (A. 37).

On cross examination, agent Theisen stated he never saw Spagnola with narcotics nor did he ever get any from Spagnola nor did Spagnola ever put him in contact with Vaselli. (A. 37)

Counsel for defendant Miecle renewed his motion for the exclusion of all hearsay testimony as to defendant Miecle, which was denied.

Government witness Frank Milazzo testified he was released from the Illinois State Penitentiary on parole on July 5, 1960. He saw and met defendant Alex Miecle several times and had conversations with Miecle and with one D'Agostino, also known as Hooks, about narcotics (A. 38). (The government at first offered the testimony only as against defendant Miecle, and the court so instructed the jury. A. 38). During the last week in July, 1960, Miecle went with Milazzo to the Club LeFemme on State Street near Tooker. He happened to run into Louis Guido there (A. 39).

(The court inquired whether the testimony regarding Guido was to be considered only as against defendant Miecle. The government answered in the affirmative (A. 39), and the court instructed the jury to consider such evidence only against Miecle. After the court made certain suggestions to the prosecutor that it should not be necessary for the court to advise the government how to try its case, the government attorneys changed their minds and moved the testimony be considered against Guido. (A. 39).

Milazzo stated that when he was in the Club LeFemme with Miecle about the last week in July, he happened to meet Louis Guido there and as he and Miecle were leaving the club, Louis Guido walked them to the door and remarked, "Let's get Frankie back in action." They left the club without answering (A. 41).

About the last part of September, Milazzo met defendant Pellegrini in some restaurant in Cicero. (The court advised the jury the testimony was offered only against Pellegrini and not against any other defendant. A. 41). Milazzo asked Pellegrini if he knew anyone to whom he

could push junk and Pellegrini said he wasn't sure but would find out and let him know. Milazzo then testified to engaging in several narcotic transactions with Pellegrini and that he obtained the narcotics which he gave to Pellegrini from Micele. In October, 1960, Milazzo and Pellegrini had another narcotic transaction; Milazzo obtained the alleged narcotics from Micele. Micele asked Milazzo again, "Are you sure you know who the party is, whether we can trust him or not?" Milazzo told Micele not to worry. About a week later he had another narcotic transaction with Pellegrini, after allegedly getting the alleged narcotics from Micele, at his home on Looms and Taylor. While at his home the witness and Micele entered Micele's washroom where the supposed narcotics were mixed and delivered to Milazzo. Some time later he invited Pellegrini into a little coffee shop around Polk and Sacramento Streets and told Micele he wanted Micele to meet Pellegrini; he introduced Pellegrini to Micele (A. 45).

About two weeks after that, he went to the Club La Femme alone. He happened to see and talk with defendant Guido. Guido remarked that Alex and Hooks owed him $1,800.00 (A. 45). He had been in the Club LeFemme prior to that time on many other occasions.

Some time in the middle of October he was seated in Micele's car and Micele asked if he wanted to go along to the Club LeFemme. Micele said he had to bring some money to the club. When they went to the Club LeFemme, Micele remarked that Lou wasn't there. They had a few drinks at the bar and Micele said, "Well, I will leave the money with someone for him", and then, after Micele left for a few minutes, he returned, stating, "I left the money for Louis". (A. 46). The witness stated Micele said the amount was $1125.00 (A. 46).

Some time in the last part of October, 1960, Pellegrini accompanied him on his calls for the aluminium company for which he was working and they spent the whole day together. Pellegrini made some phone calls and said that the people he spoke to didn't want any narcotics because they complained the stuff was no good (A. 46). Later that night he met Miecle and told him they were getting complaints that the stuff wasn't any good. Three or four days later he met Pellegrini again in a restaurant in Cicero and Pellegrini told him that the people were getting leery because the stuff was spoiled a couple of times (A. 47). They argued about it (A. 47).

In either the middle of October or the last week in October, 1960, he saw Louis Guido at the Club LeFemme. No one else was present. "He (Guido) asked if Alex had discussed with me, told me about us being partners. I told him no, Alex didn't say anything to me, and I walked off." (A. 47).

In about the last week of October, 1960, he saw Miecle and told him that the people were getting wary because the quality was getting worse and worse and they were afraid that they would be cheated. Once, about the first week in November, the witness gave Pellegrini two cellophane packages containing white powder, and went with Pellegrini to meet a man in the vicinity of 14th Street and Millard Avenue, where Pellegrini gave the man the packages (A. 48). Later, in the first week of November, 1960, Pellegrini told him there was a man from St. Louis who wanted a good grade of narcotics. Miecle is supposed to have given him two packets at Miecle's house. On November 10, 1960, he talked with Pellegrini and Miecle on Sacramento and Polk Streets and there was a discussion about the quality of the narcotics being bad and that the customer was not satisfied. (A. 48).

They went to a tavern where Miccle made a telephone call. Miccle dialed a number, and the witness heard Miccle remark, "I thought we were friends." (A. 49)

Pellegrini asked why it couldn't be straightened out that night. "Mr. Pellegrini asked me if we needed this man (Miccle). He didn't like the way he was acting." (A. 49). The next day, November 11, 1960, the witness met Miccle and Pellegrini in his sister's house. The 3 of them got into a car with Miccle. There was a brown paper bag laying on the seat; he took the paper bag and put it in his lap. They drove to 732 Bittersweet St. To the prosecutor's question to tell the jury what happened at that time, the defendants' objections were overruled (A. 50). The witness answered, "I was arrested in the lobby" (A. 50). (Motions for mistrial and for a severance were denied (A. 50).

On cross examination, Milazzo stated the first time he met Louis Guido in the Club Le Femme was quite by accident around July 21 or 22, 1960. Guido was a customer in the place and was drinking with a woman companion. During the time he saw Guido, they were drinking and engaged in just general conversation.

(To the question put to Milazzo by Guido's lawyer, "Were you ever partners with Miccle in any other criminal enterprises?" both counsel for Miccle and the prosecutor objected; the court sustained the objections. A. 64). To the question, "You were a partner with Alex Miccle in the commission of armed robberies, were you not?" the court sustained the objections of counsel for Miccle and for the government. Guido's counsel explained that on direct examination Milazzo stated that Guido asked the witness if Alex had discussed anything about their being

partners and that he should be permitted to cross examine the witness with respect to "partners". (A. 64). The court admonished Guido's counsel not to ask that type of question and counsel for Guido made an offer of proof to the effect that the inquiry from Milazzo would show that prior to the comment of Guido that the "action" engaged in by the witness Milazzo and defendant Miccle were robbery and burglary actions never narcotic actions and that there was never any discussion between Guido and the witness about narcotics; that it would be shown upon questioning of Milazzo that he was a partner of Miccle in robberies and that Milazzo and Miccle were convicted together for robbery and that the type of "action" the witness Milazzo and defendant Miccle engaged in during the period of alleged narcotic activity was in fact robbery and burglary action". (A. 65). Counsel for defendant Miccle renewed his motion for a mistrial and a severance. (A. 65, 67).

On further cross examination Milazzo testified that when Guido said that Miccle and Hooks owed $1800.00, Guido did not say what the money was for. So far as the witness knew it could be a gambling debt (A. 67). Milazzo further stated that at the time when he went to the Club LeFemme with Miccle and Miccle left some money for somebody named "Lou", Miccle did not say he left the money for Louis Guido. Miccle did not mention any last name. There were in fact three men known as "Lou" at the Club LeFemme, one of whom was Louis Vassolli, the manager. There was another Louis, whose name he did not recall, who was also a customer at the Club LeFemme (A. 67).

During cross examination by counsel for defendant Miccle, the witness Milazzo stated that it was his intention to keep defendants Pellegrini and Miccle separated and

then counsel for defendant Micele elicited from the witness that he did not narrate that series of facts on direct examination but that he had told it to Mr. Rankin and upon further question "Did you tell it to the Grand Jury, too" objection by the government was sustained. Defendant Micele made a motion for the furnishing of the Grand Jury transcript to the Court, which motion on behalf of defendant Micele was again denied. (A. 69).

On further questioning, witness Minazzo stated he was at defendant Micele's home on four or five occasions and saw his mother there several times, but he did not see defendant Micele's mother on the day they went to the washroom to get the alleged narcotics. (A. 69).

EVIDENCE CONCERNING OTHER DEFENDANTS

One Stanley Miller (A. 72-84), testified he met Joseph Gaynor and Louis Vasselli in July, 1961, and purchased narcotics from them from July, 1961 to February, 1962. He sold the narcotics to different people, one of whom was defendant Al Sacko. He went to Al Sacko's apartment. One Sam Jones was there. Jones wanted to buy narcotics, but Jones said he was broke. Sacko told the witness that they knew a lot of addicts in the neighborhood and that if they would get a free sample of the narcotics they would let the people use their apartment. He brought some stuff to Sacko's apartment and Sacko shot some stuff in Jones' arm and then shot some in his own arm. He left the package there for $200. The next day Sacko gave him $100, and the following day, $50. The next evening he got the balance of $50 and dropped off another package of white powder which he obtained from Louis Vasselli and Joe Gaynor. He received $100, and then another $25 or $50, then Sacko said they could not make

the payments because Jones was using up the stuff and they had no money. He tried to collect the money later from Sacko, but Sacko just never paid him again. Once, in November, 1961, he met Sacko and four other people in the vicinity of 18th and Halsted Streets and someone asked the witness for some stuff. Neither Sacko nor the others had any money and the witness said that Sacko owed him money and that therefor they should get out of his car.

He knew the defendant James McGarry and saw him in November, 1961, in the vicinity of Archer and Canal Streets while he was on his way to Joe Gaynor's apartment. While he was talking to Joe Gaynor, Louis Vasselli walked out of a house carrying a black brief case. He got into a car with Joe Gaynor and Louis Vasselli. He saw Louis Vasselli give McGarry something, but he didn't know what (A. 76). Later, in December, he saw Louis Vasselli in a tavern. They saw McGarry pull into a gas station. McGarry handed Vasselli some money and Vasselli told Stein where he put the package of white powder; he saw McGarry get the package. A couple of weeks later, he was in another tavern and saw Louis Vasselli and Joe Gaynor. Louis Vasselli told him that McGarry and Joe Gaynor had an argument over Joe Gaynor's patting a woman on the behind. (A. 78). Later, Louis Vasselli gave the witness McGarry's phone number. He called McGarry, met him and gave him $50 worth of white powder. Later in December, 1961, he called McGarry who told him he wanted some stuff but didn't have any money. The witness told him that he would let him know, but then never saw or spoke to McGarry again.

He saw Vasselli in December, 1961, and Vasselli had two rolls of money, one in each pocket. Vasselli said he had to drop off some money on Rush Street (A. 79).

He met one, William Olivanti, known to him as Viney in January, 1962 at 18th and Canal and sold Olivanti some white powder for $400. Later, he had another transaction with Viney and another man, known as Lover, for $400, of which he gave Louis Vasselli $200 and kept the other $200. A couple of weeks later he met Louis Vasselli and Gaynor. Louis Vasselli handed him two packages of white powder. About a week later he gave a sample to Viney. He learned in February, 1962, that Viney was Mr. Olivanti, a narcotics agent.

On cross examination the witness stated that he had no personal knowledge that the stuff in any of the packages contained heroin.

Clarence Cook, a narcotic agent, testified he met defendant McGarry on December 1, 1961, and was introduced by a special employee, William Blake. He bought a package from McGarry for $500, which package later proved to be narcotics (A. 87).

Narcotic agent William Olivanti testified he bought narcotics from Stanley Miller on January 4, 1962 and again on January 10, 1962. (A. 88-90).

Chemist John Endriz testified that government exhibits 2A (a package bought by agent Cook from defendant McGarry), 3 and 3C (packages bought by agent Olivanti from Stanley Miller) contained narcotic drugs.

The chemist testified he examined approximately 10,000 to 12,000 samples over a period of ten years. (The court sustained the prosecutor's objections to questions to the effect that samples submitted to him for examination as suspected narcotics were found in fact to be non-narcotics on many occasions. And that there were other substances contained in cellophane packages that would look the same.

such as flour, milk sugar, lactose sugar. The witness testified that from looking at the cellophane packages containing white powder, he could not tell what substance was contained therein. (A. 94).

Mrs. Patricia Guido testified she was the sister-in-law of Louis Guido and was married to Nick Guido, Louis' brother. She knew Louis Guido lived in apartment 1406 at 732 Bittersweet, Chicago, in 1960. In November, 1961, she first met Louis Vasselli at Louis Guido's apartment in the presence of Louis Guido's girlfriend, Mary, and Nick Guido. Louis Guido and Louis Vasselli went into a bedroom and closed the door. She saw Louis Vasselli at Louis Guido's apartment during November and December, 1961, about a dozen times. Louis Guido and Louis Vasselli would go into the bedroom and talk (A. 95). During the first week in November, 1961, she saw Louis Guido give her husband, Nick Guido, small money in exchange for larger bills, such as one's, five's and ten's for one hundred bills. Mary Guido was also present (A. 95).

She further saw Louis Guido in his apartment around April 20 or 21, 1962, in the presence of Mary Guido and Nick Guido. "Louis Guido told my husband, Nick Guido, to be fair with Louis Vasselli because Louis Vasselli was one person that could cause him, Louis Guido, a lot of trouble. Nick Guido told his brother, Louis Guido, that he had made all the money with him in the narcotics racket, so he should be responsible for and take care of Louis Vasselli." (A. 95). (Motion for a mistrial was denied, A. 95).

On cross examination, Mrs. Pat Guido stated she was employed in 1960 in Joliet for about a year and that she was employed in 1961 until August. She was employed in 1962. With respect to her testimony that her husband,

Nick Guido, gave one hundred dollar bills to Louis Guido in exchange for small bills during the first week in November, 1961, she was asked by defense counsel, "Where was Nick Guido employed, if he was, prior to November 1, 1961", "Did you give your husband Nick Guido any money?", "Did you ever give Nick Guido large bills", "Nicholas Guido had no money prior to November 1, 1961, had he?", the court sustained government's objections to all such questions (A. 105).

Mrs. Pat Guido states that Nick Guido had over $4,000.00 in fifty and one hundred dollar bills during the first week in November (A. 105). To the questions, "Where did he get the four thousand dollars?" and "Did he have the four thousand dollars on November 1, 1961?", the court sustained government objections (A. 106).

A series of questions pertaining to the $4,000, where it was obtained, where she saw it, whether she was with Nick Guido when he obtained it—were objected to by the government and the objections were sustained (A. 105, 106).

Mrs. Pat Guido testified that both Louis Guido and Mary Guido counted out the $800 in small bills. To the question, "What did Nick Guido do with the small bills?", "Did he keep this stack of eight hundred dollars in small bills?", "Did Nick Guido give you any of the money, the small bills?", "Where did you go when you left the apartment?", the court sustained the government's objections (A. 107).

Mrs. Pat Guido further testified that Nick Guido put the $800 in her purse because they were too big to carry in his pocket. To the questions, "Where did you take the eight hundred dollars?", "Did you later take the money to a currency exchange or a bank?", "Did you later take

the eight hundred dollars that was in your purse because it was too big for him to carry to a safe deposit box?" And "Did you pay bills with the eight hundred dollars in small bills?", the court sustained the government's objections (A. 108).

After April, 1962, she went to Louis Guido's apartment and asked him for money, which he refused to give her (A. 108).

The Government rested its case and presented no other evidence (A. 11).

EVIDENCE ON BEHALF OF DEFENDANT MICELE

Mrs. Carmiella Micele testified that she lived at 908 South Loomis Street, with Alex Micele, her son, and that he lived with her during the months of June, July and August, 1960, on the third floor. The apartment contained four little rooms. She saw Frank Milazzo in her apartment after her son's birthday on July 4th. Milazzo was there 10 or 15 minutes. He did not go into the washroom. She never left her house because she could not. (A. 119) She saw Milazzo some day in October in her house. Her son did not go into the bathroom with Milazzo that night. They all sat in the kitchen; the entrance to the bathroom was in the kitchen. She never met a man by the name of Albert Spagnola and did not know him. During that period, she never left the house (A. 120).

On cross examination, she again testified that she never left the house; that she would go only from room to room. She knew Alex was working in 1960, but did not know where. She lived alone now. Her two daughters, one of whom lived next door and the other who lived in the same building, would visit her frequently and take care of her (A. 120).

Frances Micele testified that she married Alex Micele on April 8, 1961, having previously met him in May of 1960.

Soon after, they began dating and Alex told her he worked as a bookmaker and during May, June and July, Alex would come to her home every night between 6:00 P.M. and 7:00 P.M. Her mother, father and brother were also there. She went on vacation between July 18 and July 28th. After her return on July 28, 1960, she saw Alex Micele every night during the months of August, September and October. On October 28, 1960, she entered the hospital and Alex Micele came to see her with her mother every night arriving at about 7:00 P.M. and leaving at about 9:00 P.M. She became engaged to Alex Micele on November 5, 1960. (A. 120). She would stay in his company until 12:00-12:30. (A. 121).

She met Frank Milazzo in July of 1960 with Alex and has never seen him after that. She did not know John Pellegrini or Albert Spagnola. Up to the trial of this cause, she met Louis Guido once. (A. 121) After her marriage to Alex Micele, Alex continued to work as a bookmaker, and would return home each evening at 6:00 P.M. Before she was married, she saw Alex Micele every evening between 6:00 P.M. and 7:00 P.M. except for the time she was in Florida and in the hospital. She saw him about 7:00 P.M. each night and sometimes they went out and sometimes they stayed home.

On cross examination, she did not know for whom Alex Micele was working as a bookmaker. He did not bring his business home with him by way of betting slips, racing forms, etc.; she never saw any narcotics in her automobile.

He did not have any narcotics in the house; nor did he ever have narcotics. (A. 121). While Alex Miele was working, he got paid every day and he worked six days a week. He gave her $18.00 per day, all of his earnings.

During the final argument by the government, Mr. James Bailey, Assistant United States Attorney, argued the truth spoken by the witness Frank Milazzo, by stating as follows:

> "So Frankie (Milazzo) chose the only right way, to come in before the Grand Jury, and to come in here before this court, and tell the truth, unless he would go back there for life." (A. 132)
>
> "That is what Frankie did. Frankie told the truth, and he took that stand . . ." (A. 132)
>
> "Frankie was faced with a choice, spend his life in prison, or testify and tell the truth. Frankie chose the right one, for the first time in his life . . ." (A. 132).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

Does prejudice occur to a defendant from the conduct and statements of the attorney for a codefendant, equally as well as from the conduct and statements of the attorney for the government?

When the attorney for a codefendant, during cross examination of a government witness, deliberately and repeatedly propounds questions to a government witness, referring to the past criminal record and activities of another defendant, not represented by the questioning attorney, is the nature of such questions changed from prejudicial to innocuous?

And does a trial court err in failing to grant a mistrial or in the alternative a severance during a trial, when the attorney for a codefendant repeatedly refers to the past criminal record and activities of another defendant in the cross examination of the main government witness?

All of the parties in a criminal proceeding are represented by equals. They are represented by advocates. *Horton* v. U.S., 256 F. 2d 138, 141 "for it must be remembered that the district attorney is an advocate, as is counsel for defense."

Despite the equality of the advocates the Circuit Court of Appeals for the Seventh Circuit, has not deigned to recognize that what the Circuit Court of Appeals for the Fifth Circuit has acknowledged.

The Fifth Circuit Court of Appeals in *DeLuna* v. *United States*, C.A. 5, 308 F. 2d 140, has recognized that when the attorney for one defendant during his closing argument refers to the fact that the other defendant did not take the stand and that the defendant represented by him did so take the stand, that such is error. That such is error and is in fact created by the attorney for a codefendant equally as well as is done when such remarks are made by the district attorney.

Can there be any difference in the error created against one defendant, when the attorney for a codefendant repeatedly questions a main government witness about the witnesses' previous crimes and criminal associations with that other defendant. How can the error be more clearly demonstrated than when the Court of Appeals states (Op. Page 4) "The court repeatedly sustained objections with repeated caution to Guido's attorney who seemed bent upon producing error, or trying to save Guido by attempting to impeach Milazzo at Miccle's expense."

While questioning the witness Guido's attorney was persistent and dogged in his determination in trying to develop the past criminal experience of Miccle and equally as persistent in ignoring the court's admonitions, cautions and warnings to him. (A. 64, 65 and 66)

This Court in *Berger* v. *United States*, 295 U.S. 78, stated:

> "It is error when the prosecuting attorney oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal case, by asking questions such as were asked at the trial of this case."

The Court of Appeals for the Second Circuit in *United States* v. *Rinaldi*, 301 F. 2d 576, reversed a conviction of one Rinaldi when his wife on cross examination, was asked whether her husband had ever been convicted of crimes. The Court cited as authority for reversal, *Marshall* v. *U. S.*, 360 U.S. 310; *United States* v. *Tomaido*, 2 Cir., 249 F. 2d 683; *United States* v. *Iacangelo*, 3 Cir., 281 F. 2d 574; *Hilton* v. *United States*, 5 Cir., 221 F. 2d 338.

The upshot of each of the referred cases is that when a defendant's background and character in relation to the commission of other crimes is not placed at issue by him, to bring such matter before the jury is error.

If as in *Peel* v. *United States*, 5 Cir., 316 F. 2d 907, 912 such a remark by the counsel for other defendant was inadvertent, then maybe it would have been proper for the Circuit Court of Appeals to state, "We cannot say the incident was reversibly erroneous" (Op. P. 4) Here, however, the action of the attorney for the defendant Guido was persistent, repeated and pointedly directed at the defendant Miccle.

The complaint of the defendant Miccle was not late in that motions for severance had been filed by him prior to trial (A. 6-7) and renewed during the course of the trial. (A. 64, 66)

There is no sound reason to preclude the defendant Miccle from a trial free of such prejudicial error when such could have been done by the trial court, as the prejudicial error developed during the trial of the cause, either by granting the mistrial or a severance as to Miccle. Our system of legal process does not endorse a proceeding where all of the defendants do not receive the same guarantees and to deny a defendant a trial free of prejudice is error of the grossest nature. On petition for rehearing

of *DeLuna v. United States*, 5 Cir., 308 F. 2d 140, in the *per curiam* order denying the rehearing filed by the government, that Court succinctly stated, 324 F. 2d 375, 376, and which is applicable here, "The overriding consideration in all criminal cases is measured justice according to the Constitution. The inconvenience of a severance and the possibility of a mistrial if there should be a joint trial of codefendants do not tip the scales for the Government when an accused's right to silence is in the balance."

2.

Where the evidence clearly discloses not less than two separate and distinct conspiracies, separated both by time and geographical chasms, a conviction may not be sustained against a defendant, not shown to have participated in, or been a member of, or had knowledge of the existence of but one separate, distinct and independent conspiracy.

Certainly, a demonstration is made by the government's own evidence that as far as the defendant Miccle is concerned he cannot be found in the activities of the group of conspirators formed and created nine months after the last alleged participation by him. The witness, Milazzo testified to transactions involving Miccle during the months of October and November, 1960 (A. 41-73) and the witness Spagnola's testimony was of transactions only during July and August, 1960. (A. 24-34) Subsequent to this, during the entire remainder of the proceedings, there was no mention of Alex Miccle. It appears that the participation of Miccle, terminated with the arrest of Milazzo on November 11, 1960. (A. 50)

From thence forward the sole figure common to any alleged narcotic transaction was Louis Vaselli. The government, in four separate attempts, tried to link Miccle with

the remainder of the defendants on trial when they asserted in their Brief in the Circuit Court of Appeals four distortions of the evidence presented in the trial courts. (Appellant Miecle's Reply Brief—P. 23). Although admitting to such error on their part upon oral arguments of the cause, the Court in its opinion adopted as fact these errors. (Op. P. 2).

If these errors are not used as the basis for sustaining the allegations of a general conspiracy in the indictment, then the sole common figure to each of the distinct conspiracies, a la *Kotteakos v. United States*, 328 U.S. 750, is apparent. If but for Louis Vaselli there is not a single other connection between Miecle and Gaynor, Brown, Carr, DeLuna, Hutchison, Jones, Kulutz, Lopez, McGarry, Petraski, Sacko or Saracco. (A. 6)

The testimony of Miller, (A. 73-84) Cook (A. 85-87), Waltz (A. 88), Olivanti (A. 88-90) and Endriz (A. 90-94), all related to transactions occurring between July, 1961, and January, 1962, and were not related in any way to Miecle. In fact, there was a dearth of physical exhibits introduced against Miecle. Using the safety of the conspiracy allegation as the lever, the government introduced into evidence physical exhibits that could only apply to these later named co-conspirators during their period of flux between July, 1961 and January, 1962.

The full sweep of the evidence was that the defendant Miecle may have been aware and possibly participating with Milazzo but just as certainly when Milazzo ends his participation, then all connection between Miecle and the remainder of the alleged co-conspirators terminates.

3.

Where a witness responds to one of a series of questions, upon cross examination, as to a difference in the "story" he related to the Grand Jury, does the court err in striking from the jury's consideration answers to other questions as to differences between the witnesses' tale before the Grand Jury and the jury hearing the same case.

When a "particularized need" has been shown for an in camera examination of the minutes of the Grand Jury and their use by the defense during cross examination of a witness, the court may properly deny access to such minutes to the defense.

May, after the court has refused to examine the Grand Jury minutes in camera or submit them to the defense for use during cross examination, statements in closing argument by government's counsel that a witness told the truth before the Grand Jury, and the jury hearing the cause, be other than prejudicial error requiring reversal of the cause.

During the cross-examination of the witness Milazzo, the witness during an exchange as to the amount of money he made for his engagement in the narcotics traffic, answered a question as to whether he told the Grand Jury he made as much as he stated on direct examination during the trial. (R. 460). His answer then was of a figure less of what he related upon the trial. The Defense was then met by the interposition of objections to further inquiry as to what that witness told the Grand Jury. The Circuit Court of Appeals recognizing that the refusal of the trial court to make even an in camera examination of the minutes of

the Grand Jury testimony should not go uncorrected. Accordingly, many months after the conclusion of the trial the trial Court was directed to make *in camera* examination of such testimony for "inconsistencies" which were in the minutes. (Op. P. 6)

The trial court evidently smarting under the order of the Circuit Court of Appeals certified to that court that "he examined the grand jury testimony and compared it with the transcript of the trial testimony *and written statements* of the witnesses produced at the trial and that there were no material inconsistencies".

The trial court also forwarded the minutes to the Circuit Court of Appeals where they were read. It should be noted that after the examination of the minutes, the Circuit Court of Appeals come to a different conclusion than the trial court. The Circuit Court of Appeals then said "Their testimony (witnesses) at the trial may be more expansive, but on the whole, we see no inconsistencies and we cannot see that denial of *in camera* examination and use of the grand jury testimony to impeach was prejudicial." (Op. P. 6)

Certainly, when someone becomes more expansive about a subject an inference can be drawn that he has become more knowledgeable about a subject, or when the subject is not based on a known factual situation that a fertile imagination has had more time to nurture the fruits. If only facts are to be presented during a trial conjecture, speculation and supposition should not be allowed to expand the original recitation.

A clearer demonstration of particularized need, acknowledged by the Circuit Court, for use of these minutes during cross examination could not be had.

4.

Is the proof of a crime alleged in an indictment complete where the prosecution fails to establish the particular venue alleged in the indictment.

The Seventh Circuit Court of Appeals has stated on more than one occasion, *United States v. Breaux*, 7 Cir., 225 Fed. 2d 750; *United States v. Jones*, 7 Cir., 174 F.2d 746, "One of the things the government had the burden of proving is venue. It is an essential part of the government's case. Without it, there can be no conviction." And relying on *Jasick v. United States*, 8 Cir., 299 F. 496, the Seventh Circuit Court of Appeals refuses to take judicial notice that streets referred to in the evidence are in any certain town.

As to Counts 11 and 14 of the indictment, upon which the defendant was tried, substantive crimes were alleged. The only evidence asserted by the government in this regard was the witness Milazzo (A. 38,72) and not on one occasion did he establish the venue wherein the alleged crimes occurred. This was lacking on both direct and cross examination.

To rationalize that venue could have been proved, when it was not, does not suffice to supply the deficiency. Accordingly the total failure of proof as to one essential element is sufficient to prevent proof of the entire crime. For this reason we urge error not considered by the Court of Appeals. (Op. P. 5)

5.

Where the main and only witnesses for the government as against the defendant Micele, were admitted felons as well as accomplice witnesses, an instruction limited only to the "accomplice" nature of the witnesses is not sufficient to apprise the jury of the proper weight to be given the testimony of the multifaceted witnesses, and it is error to deny an instruction as to the great care with which the testimony of felon accomplice witnesses is to be received.

The only witnesses against defendant Micele were Albert Spagnola (A. 24-35) and Frank Milazzo (A. 38-71). Each of which were convicted and up to the time of trial had been serving sentences in various state penal institutions for various felonies committed by them. (A. 24, 38, 50) Milazzo, being the stronger of the two even conditioned his testimony upon the government interceding in securing him a parole prior to the giving of any testimony. (A. 56)

The defense, in mass, objected to the instruction tendered by the government and tendered instead an instruction founded upon this court's statement in *Crawford v. United States*, 212 U.S. 183, 204, which the trial court refused. The instruction given was approved by the Court of Appeals (Op. P. 5) but they did acknowledge that it was not the same as recommended by this court. The Court of Appeals stating "The given instruction is not altogether as strict as the court in *Crawford v. United States*, 212 U. S. 183, 204 (1909), implies an instruction under such circumstances ought to be. On the other hand, it does not fall so short of the mark as to be reversible error because on the whole of the record, we are not of the opinion that the failure to give the proffered instruction prejudiced defendants. *Id.* at 204."

Crawford at P. 203, 204 sets the rule as follows:

> "But a felon, being also a confessed accomplice was thus produced by the government as a witness for the purpose of proving its case against defendant . . . Without his evidence it would have been difficult, if not impossible, to convict the defendant. . . . But the evidence of a witness, situated as was Lorenz is not to be taken as that of an ordinary witness of good character in a case, whose testimony is generally and *prima facie* supposed to be correct.
>
> On the contrary, the evidence of such a witness ought to be received with suspicion and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses."

The only evidence presented against Miele on the trial of this cause were two admitted co-conspirators who have the additional status of several previous felony convictions, from which each of them were endeavoring to shorten or curtail the punishment previously meted out to them. The jury should have been more accurately instructed and not have been instructed with a degree of "shortness" as to the manner in which the testimony was to be received.

6.

Where a government attorney informs the Jury that a witness has told the truth during his testimony at the trial and also before the Grand Jury, prejudicial error occurs to the defendant.

Where the government prosecutor expressed his personal belief in the testimony of government witnesses, while arguing to the jury, the Court of Appeals for the First

Circuit reversed a conviction in *Greenberg v. United States*, 280 F. 2d 472, at P. 475, the Court stated:

> "To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury) would afford him a privilege not even accorded to witnesses under oath and subject to cross examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is unfortunate if one of them has advantage of official backing".

Is not this sufficient error to predicate a reversal of the conviction. With this as a culmination of all of the errors alleged before, the defendant Miccle was inundated in an ocean from which he could not be other than swept over along with all the others that were tried at the same time he was.

The nature of the remarks of the prosecutor here (A. 131-132) was to allude to the fact that the defendant Miccle did not take the stand in his own defense. Such conduct is not proper, so has this court determined. *Stewart v. United States*, 366 U. S. 1.

Again the compound nature of the situation in the trial court should have demanded and does demand a reversal of the conviction on all counts.

CONCLUSION.

The petitioner respectfully submits that a greater amount of prejudicial error has not been presented to your Honors. Petitioner earnestly prays that your Honors will consider this a fit case to warrant this Court's attention.

Respectfully submitted.

STEPHEN LEVY,
ALVIN W. BLOCK,
Attorneys for Petitioner

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 14145-14149

SEPTEMBER TERM, 1963 — SEPTEMBER SESSION, 1963

No. 14145
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALEX MICELE,
Defendant-Appellant.

No. 14146
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LOUIS GUIDO,
Defendant-Appellant.

No. 14147
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN C. PELLEGRINI,
Defendant-Appellant.

No. 14148
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THOMAS McGARRY,
Defendant-Appellant.

No. 14149
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALBERT SAKAS,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 8, 1964

Before Knoch, Kiley and Swygert, *Circuit Judges*.

Kiley, *Circuit Judge*. These five appeals arise from the same trial by jury under an indictment of nineteen counts, the first charging conspiracy[1] and the balance charging substantive offenses, in violation of narcotics laws.

The conspiracy count named these five defendants, fourteen other defendant co-conspirators, and fourteen non-defendant co-conspirators, and alleged the conspiracy lasted from the summer of 1960 through 1962. Louis Guido and Albert Sakal[2] were named in the conspiracy count only; Alex Micele, John Pellegrini and Thomas McGarry were named in the conspiracy count and one or more substantive counts. All were found guilty of the various charges against them except that Pellegrini was found not guilty of the substantive offense charged against him.

For the sake of convenience, we shall treat as one each question common to each appeal.

Micele, Guido, Sakal and McGarry contend there is insufficient evidence to support their convictions under the conspiracy. Taking the evidence in the light most favorable to the government, as we are required to do, *United States* v. *Glasser*, 315 U. S. 60, 80 (1942), there is evidence showing that Micele with Louis Vaselli agreed to furnish narcotics to Albert Spagniolia, and that they did so; that Micele with Anthony D'Agostino discussed with Frank Milazzo an opportunity to "pass the stuff" and both took him to meet Guido; that Micele passed narcotics to Milazzo for Pellegrini; that Guido told Milazzo that Micele and D'Agostino owed him money and later Micele left money at a night club for Guido; that Guido indicated to Milazzo

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[1] In violation of 21 U. S. C. § 174.

[2] The indictment named Sakal as "Al Sacko."

that Miceli and Guido were partners; that Vaselli and Guido met several times in Guido's apartment; that Nick Guido's wife heard him tell Louis Guido that the latter made money with Vaselli in the "narcotics racket;" and that Miceli, Pellegrini and Milazzo were arrested in the apartment building where Guido lived as they were returning narcotics which customers claimed were of poor quality.

There is other evidence showing that Vaselli and Joe Gaynor sold narcotics to Sakal; that they tested narcotics in Sakal's apartment, used by addicts; that these addicts were Sakal's market for distribution; and that Sakal and his roommate would be able to do a good business.

There is evidence of Vaselli leaving a package of white powder on a window sill, McGarry giving Vaselli money and picking up the package; of Stanley Miller's selling narcotics to McGarry; and of McGarry selling narcotics to a government agent.

We conclude that there is sufficient evidence to support the convictions under the conspiracy count. We see no necessity of discussing cases that went off on grounds of "mere suspicion," "mere association," "mere knowledge, approval of or acquiescence in" the goals of the conspiracy. They have no application here. The evidence amply justified an inference that each of the defendants knew of the conspiracy and associated themselves with it. *United States v. Varlies*, 274 F. 2d 179, 189-90 (2d Cir. 1960), *cert. denied*, 362 U. S. 974. *Nye & Nissen v. United States*, 168 F. 2d 846, 852 (9th Cir. 1948).

We see no merit in the contention that the defendants were prejudicially misjoined in Count One. We do not agree that the proof showed two conspiracies with some of the defendants participating in but one, and that they were

accordingly harmed by the evidence of the other conspiracy. The testimony showed what might be called a north side group—Guido, Vaselli, Miccle—and a south side group—Vaselli, Gaynor—in the distribution of narcotics. It is true that Guido's and Pellegrini's names appear only in the north side distribution process and there is no testimony that they knew the members of the south side group or vice versa, or had any connection with them other than through Vaselli and to some extent Gaynor. But that is not fatal to the joinder. *United States* v. *Carminati*, 247 F. 2d 640, 644 (2d Cir. 1957), *cert. denied*, 355 U. S. 883. *United States* v. *Cohen*, 197 F. 2d 26, 29 (3d Cir. 1952).

The integrated distribution structure, shown by the testimony, did not preclude the inference that those separated from each other at lower levels, as Pellegrini, Sakal and McGarry were, knew the common source of the narcotics at the top, Vaselli and Guido. It was a single-structured conspiracy, and *Kotteakos* v. *United States*, 328 U. S. 750 (1946), does not apply. It is unimportant that the proof as to those at lower levels does not carry them to the conspiracy's end. *United States* v. *Strömberg*, 268 F. 2d 256, 264 (2d Cir. 1959), *cert. denied*, 361 U. S. 863, 868.

For these reasons we think the court did not err in denying severance as to Guido, Pellegrini and Miccle. Since there is no merit to the contention of misjoinder of the conspiracy count, the court did not err in instructing the jury to consider the testimony of all witnesses, with certain exceptions, against all defendants.

We see no merit either in Pellegrini's contention that he was prejudiced by the court's denial of his motion for a severance because he was not named with any other defendant in a substantive count against him and was compelled to stand trial with other defendants.

And we see no merit in the claim of McGarry's "entrapment." The evidence plainly refutes his claim that the seed of his offense was planted in his mind, and that he was an otherwise innocent person.

Pellegrini, Miccle and Guido claim error in denial of their motions for bills of particulars. The motions were addressed to the district court's discretion, *United States* v. *Holovachka*, 314 F. 2d 345, 349 (7th Cir. 1963), *cert. denied*, 374 U. S. 809, and we have not been shown any abuse of discretion in the court's ruling. The court could with reason have concluded the motions called "for too much details of evidence." *Wong Tai* v. *United States*, 273 U. S. 77, 82 (1927). Based on our inspecting the indictment, we conclude that defendants were sufficiently "apprised of the nature of the offense charged" against them, and there was probably "no danger of a violation of the principle of double jeopardy" *United States* v. *Garfoli*, ... F. 2d ..... (7th Cir. No. 14159, November 22, 1963).

During the cross-examination of Milazzo, attorney for Guido asked him whether he had not been a partner in robberies with Miccle. The court repeatedly sustained objections with repeated caution to Guido's attorney who seemed bent upon producing error, or trying to save Guido by attempting to impeach Milazzo at Miccle's expense. *United States* v. *Cohen*, 124 F. 2d 164, 166 (2d Cir. 1941). We cannot say the incident was reversibly erroneous. *Ibid.*

Guido, and Pellegrini adopting Guido's argument, claim prejudice through unfair publicity arising from the extensive newspaper publicity about a notorious trial of his brother, Nick, in a state court contemporaneously with the trial in the case before us; and because of the participation by Nick's wife, Mrs. Pat Guido, in Nick's trial and this one.

The district court admonished and cautioned the jury at each noon recess and at the close of each day's session against reading or looking at newspapers, listening to the radio or television, or looking at television, or discussing the case with each other or with others. On the day following what seems to be the most prominent publicity of his brother's conviction, Louis Guido moved for an *in camera* examination of each juror. The court denied the motion but gave a thorough cautionary instruction to, and examination of, the jury *en banc*. Since the publicity was not about Louis Guido nor of his trial, and since the district court's admonitions satisfied the requirements for a fair trial under the "special facts" of this case, there is no merit in this claim and *United States* v. *Accardo*, 298 F. 2d 133 (7th Cir. 1962) does not apply.

Guido also claims error in the court's limitation of cross-examination of Mrs. Pat Guido with respect to her employment and to money she testified seeing exchanged between Nick and Louis Guido. We have examined the direct and cross-examinations of this witness and see no abuse of discretion in the court's limitation of the cross-examination. The limited cross-examination was sufficient basis for an estimate of the witness and her credibility; and unless the limitation was imposed, the cross-examination would have included improper impeaching questions that could have led to seriously diverting rebuttal testimony.

Miccle, Guido and Pellegrini claim prejudice in the district court's failure to instruct the jury properly upon the testimony of accomplice Milazzo. The instruction proffered, and refused, was:

> "Where an accomplice is also an admitted felon—you must treat this testimony with even greater suspicion, and you must act upon it with even greater hesitation."

The pertinent instruction given was:

> "* * * the testimony of an accomplice witness, is to be received with caution, and weighed with great care."

The given instruction is not altogether as strict as the court in *Crawford v. United States*, 212 U. S. 183, 204 (1909), implies an instruction under such circumstances ought to be. On the other hand it does not fall so short of the mark as to be reversible error because on the whole record we are not of the opinion that the failure to give the proffered instruction prejudiced defendants. *Id.* at 204.

During the trial motions were made for an *in camera* examination of the grand jury testimony for inconsistencies in the testimony of prosecution witnesses Milazzo and Miller before the grand jury and at the trial, and the government offered the minutes of the grand jury testimony for *in camera* inspection. The motions were denied. Because a stricken answer of Milazzo indicated possible inconsistencies, and because he and Miller were main prosecution witnesses, and accomplices and felons, we thought a sufficient "particularized need" had been demonstrated so that the court should make an *in camera* examination of the grand jury testimony for the "inconsistencies" which defendants argued were probably in that testimony. *Pittsburgh Plate Glass Co. v. United States*, 360 U. S. 395, 399 (1960); *United States v. Nassau*, 301 F. 2d 243, 245 (7th Cir. 1962); *United States v. Mazza*, 280 F. 2d 74, 79 (7th Cir. 1960).

Accordingly, following *United States v. Soutgate*, 290 F. 2d 51, 67 (2d Cir. 1969), we ordered the trial judge to examine the grand jury testimony *in camera* and to certify to us: (1) whether there were inconsistencies in the testimony

of Milazzo and Miller, and if so (2) whether they were material; and to transmit to us the grand jury testimony. The judge has transmitted, *sealed*, the grand jury testimony to us with his certificate that he has examined the grand jury testimony and compared it with the transcript of the trial testimony and written statements of the witnesses produced at the trial; and that there were no material inconsistencies.

We have read the grand jury testimony of Milazzo and Miller and agree with the trial judge that no material inconsistencies appear. Their testimony at the trial may be more expansive, but on the whole we see no inconsistencies, and we cannot see that denial of *in camera* examination and use of the grand jury testimony to impeach was prejudicial.

Since the sentences of Miesle's convictions on the two substantive counts are to run concurrently with his sentence on the conspiracy count, and since his conviction is justified on the conspiracy count, we need not consider the contentions he raises as to the substantive counts. *United States* v. *Doran*, 299 F. 2d 511, 514 (7th Cir. 1962).

For all the reasons given, the judgments are affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois, 60610
Friday, January 31, 1964

Before

Hon. John S. Hastings, *Chief Judge*
Hon. F. Ryan Duffy, *Circuit Judge*
Hon. Elmer J. Schnackenberg, *Circuit Judge*
Hon. Wm. G. Knoch, *Circuit Judge*
Hon. Latham Castle, *Circuit Judge*
Hon. Roger J. Kiley, *Circuit Judge*
Hon. Luther M. Swygert, *Circuit Judge*

United States of America,
Plaintiff-Appellee,

No. 14115-40-47 vs.

Alex Mioek, Louis Guido and John J. Pellegrini,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court sitting *en banc*, that the petition for rehearing filed by defendants-appellants Alex Mioek, Louis Guido and John J. Pellegrini, be, and the same is hereby, Denied.

APPENDIX C

In The

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Statutes Involved.

Title 18 United States Code, Section 1403, provides in relevant part:

"(a) Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in—

(1) . . .

(2) subsection (c), (e), or (i) of Section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. Sec. 174) or

shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than $5,000.00.

(b) For purposes of this section the term 'communication facility' means any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures, and sounds of all kinds by mail, telephone, wire, radio, or other means of communication."

Title 21, United States Code, Section 174, provides in relevant part:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, con-

trary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five nor more than twenty years and, in addition, may be fined not more than $20,000.00."

No. 8883

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963

ALEX MICELE

Petitioner,

UNITED STATES OF AMERICA

Respondent.

Certiorari to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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May it Please the Court:

The Respondent's Brief in opposition to the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit contains errors in the summary of evidence (Gov't. Brief 3-8) which are of material, factual importance, and if not brought to this court's attention could result in the reaching of a decision not warranted by the facts as presented upon the trial of this cause.

Respondent's oppositional statement does not respond to the assertion of this petitioner that the conduct, action and comment of an attorney for a co-defendant upon the trial of this cause resulted in prejudice to petitioner, nor does the Respondent's Brief in Opposition attempt the premise that a conspiracy has been proved upon the trial of the cause. It appears that the presentation in response to the Petition presented is one supposing that the decision of the Circuit Court of Appeals for the 7th Circuit cannot be sustained, by fact of law, but should be sustained because the petitioner may have associated with bad fellows in the past.

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THE ACTIONS, CONDUCT AND STATEMENTS OF THE ATTORNEY FOR THE CO-DEFENDANT DID SUBSTANTIALLY PREJUDICE THE PETITIONER

It is the Government would have us believe, a single isolated question as to the criminal background of the petitioner had been propounded by the attorney for the co-defendant Gross? Brief p. 9. By such words there might be validity to the government contention that no reversible error resulted to petitioner. However, the fact was that there were repeated warnings and cautioning of the trial court as to the conduct and statements of the attorney for petitioners co-defendant. R. 1046. The attorney [illegible] after having a slightly different course of questioning [illegible]

It [illegible] the Government [illegible] propriety and fairness that an officer of the court should act with [illegible] *Berger v. United States*, [illegible] Government Brief, p. 10] to state that *Johnson* will not [illegible]

THE EVIDENCE DOES NOT SUSTAIN THE ALLEGATION OF THE INDICTMENT AS TO ONE GENERAL CONSPIRACY

Lefemine, and the Witness Mijazzo did not know for who Miccle is supposed to have left the money. (A. 67) Evidence was not presented that Guido and Miccle were partners (Gov't. Brief p. 11) in any sort of activity; that the purported phone call was to Guido (Gov't. Brief p. 6); that the return was to be made to the defendant Guido (Gov't. Brief p. 11).

The assertion of any general conspiracy by way of argument is made solely by ignoring the time, geographical and personnel gaps that were demonstrated and acknowledged by the government in their resume of the evidence (Gov't. Brief pp. 3-7).

The evidence taken in the light most favorable to the government, creates a situation found in *Kotteakos v. United States*, 328 U.S. 750. Louis Vasello is shown to be the sole common character, the center, the hub.

The evidence is not of a definitive nature as to what relation Louis Guido had to Louis Vasello and even more certainly, there is no relationship shown between Guido, Vasello and Miccle.

THE GRAND JURY MINUTES SHOULD HAVE BEEN MADE AVAILABLE TO THE DEFENSE FOR USE DURING CROSS EXAMINATION

FAILURE OF THE COURT TO GIVE AN INSTRUCTION AS TO THE NATURE OF TESTIMONY OF A FELON ACCOMPLICE WITNESS

The Government in its brief (pp. 21-22) still avoids comment upon whether or not the petitioner was entitled to an instruction as to the manner in which the testimony of a felon accomplice is to be received. The instruction complained of not for an error in commission, but an error in omission, the nature of a felon witness and the "care and caution" with which testimony from a felon is to be received.

WHETHER THE GOVERNMENT COUNSEL MAY IN FORM THE JURORS THAT ANY PARTICULAR WITNESS TOLD THE TRUTH

The Government Brief (pp. 20-21) argues that an invitation was extended for government counsel to state, with his authority, that the witness Miazzo told the truth before the Grand Jury and upon the trial of the indictment because defense counsel told the jury that the witness Miazzo lied to the F.B.I. and to the Grand Jury. (Gov't p. 21)

Examination of the record discloses that it was on cross-examination that the witness Miazzo stated he lied to the F.B.I. (A. 51) and that he told a different story on his first appearance before the Grand Jury (A. 51) and not any of the defense counsel that so made any statements.

The Government has failed to deny that such argument of the government attorney was an improper allusion to the fact that the defendant did not testify in his own behalf.

CONCLUSION

The original brief and the matters stated here are respectfully submitted to your honors as sufficient and worthy reasons upon which the petition for the Writ of Certiorari should be granted.

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Attorneys for Petitioner